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IN THE

Supreme Court of the United States

OCTOBER TERM

No. 304

JOHN S. BAK and A 1964 CADILLAC,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(On Petition For Writ Of Certiorari To
The Supreme Court Of Illinois)

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 45 Ill. 2d 140 (1970).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

CONSTITUTIONAL PROVISIONS

The petitioner relies on Section One of the Fourteenth Amendment to the Constitution of the United States.

QUESTION PRESENTED

Whether a defendant, on a motion to quash a search warrant, is entitled as a constitutional right, to go beyond the four corners of the warrant for purposes of testing the truthfulness of the statements contained within the affidavit.

STATEMENT OF FACTS

On April 25, 1967, Officer Donald Konley, a member of the Sheriff's Police Vice Control Unit, Cook County, Illinois, appeared before the Honorable John F. Reynolds, a Judge of the Circuit Court of Cook County, Illinois, and filed a complaint for a search warrant, the text of which is set out in Appendix C of Petitioner's Brief for Certiorari at A31-2.

Judge Reynolds issued the search warrant and later the same day the warrant was executed by Officer Konley. The petitioner, John S. Bak was stopped in his 1964 Cadillac automobile by Officer Konley, and served with a copy of the warrant. Officer Konley then searched Bak's automobile under the authority of the warrant. The search revealed bet slips and racing forms which were seized by Officer Konley.

In his subsequent trial for gambling (Case No. 41151) the petitioner was found guilty and fined $250.00. Shortly thereafter Bak's automobile was declared forfeited in accordance with the provisions of Ch. 38, Art. 36, of the Illinois Criminal Code of 1961 (Case No. 41315).

In both cases, petitioner moved to quash the search warrant and suppress the evidence. At the hearings on the motions, in the words of the Supreme Court of Illinois, the petitioner:

> "offered to prove that on the two instances cited in the affidavit in support of the reliability of the informer arrests resulted but no convictions; that the affidavit had misrepresented the physical appearance of the tavern, which misrepresentations could be proved by photographs and witnesses; that there was no rear room to the tavern but there was another entrance to the tavern from another street, which entrance was not visible from the part of the bar from which the affiant had made his observations; that the informer never had any contact with the defendant or his car; and, finally, that the only paragraph mentioning the defendant was the last one in the complaint, which obviously had been typed on a different typewriter, and which may have been added after the execution of the search warrant!" 45 Ill. 2d at 141-42.

In both cases the courts rejected petitioner's offer on the ground that the purpose of the hearing was not to test the veracity of the statements made in the affidavit but, rather, to determine whether the Magistrate had probable cause, based on the face of the complaint, to issue the search warrant. The Supreme Court of Illinois, on rehearing, affirmed the judgments of the lower courts.

REASONS FOR DENYING THE WRIT

ON A MOTION TO QUASH A SEARCH WARRANT, A DEFENDANT DOES NOT HAVE A CONSTITUTIONAL RIGHT TO GO BEYOND THE FOUR CORNERS OF THE WARRANT FOR THE PURPOSE OF CONTROVERTING THE MATTERS CONTAINED WITHIN THE AFFIDAVIT.

In the proceedings below, on a motion to suppress and again at trial, the petitioner sought to show that no probable cause existed for the issuance of a search warrant because the informer was not reliable and allegations made by the affiant-police officer were false. The trial court held that petitioner could not inquire behind the affidavit and search warrant since, on their face, probable cause existed. The Supreme Court of Illinois affirmed the decision of the trial court, *People* v. *Bak*, 45 Ill. 2d 140 (1970). The People submit that the decision of the Supreme Court of Illinois was correct.

A.

TO PERMIT A DEFENDANT TO GO BEYOND THE FOUR CORNERS OF THE WARRANT IS INCONSISTENT WITH McCRAY v. ILLINOIS.

The People contend that when a law enforcement officer submits his proposed search and the grounds therefor to prior judicial review, then the only issue before the trial court on a motion to suppress is the legal sufficiency of the affidavit's allegations. On the other hand when a search is conducted without prior judicial approval then the trial court may fully review both the factual and legal basis of the search. This view of the differing scope

of inquiry on a motion to suppress in warrant and non-warrant cases is supported fully by *McCray* v. *Illinois*, 386 U.S. 300 (1967), decided subsequent to *Rugendorf* v. *United States*, 376 U.S. 528 (1964):

> In *McCray*, this Court adopted an opinion of the Supreme Court of New Jersey [*State* v. *Burnett*, 42 N.J. 377, 385-88, 201 A. 2d 39, 43-45 (1964)] stating:
>
> "The Fourth Amendment is served if a judicial mind passes upon the existence of probable cause. Where the issue is submitted upon an application for a warrant, the magistrate is trusted to evaluate the credibility of the affiant in an ex parte proceeding. As we have said, the magistrate is concerned, not with whether the informant lied, but with whether the affiant is truthful in his recitation of what he was told. If the magistrate doubts the credibility of the affiant, he may require that the informant be identified or even produced. It seems to us that the same approach is equally sufficient where the search was without a warrant, that is to say, that it should rest entirely with the judge who hears the motion to suppress, to decide whether he needs such disclosure as to the informant in order to decide whether the officer is a believable witness." (386 U.S. 300, 306-308).

This opinion could not be more clear. "The magistrate is trusted to evaluate the credibility of the affiant in an ex parte proceeding." There is no reason for reviewing Courts to have less confidence in the magistrates of Illinois than this Court displayed in *McCray*.

As this Court has stated: "A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965).

B.

TO PERMIT A DEFENDANT TO GO BEYOND THE FOUR CORNERS OF THE WARRANT WOULD RENDER MEANINGLESS THE CONCEPT OF PRIOR JUDICIAL REVIEW OF PROBABLE CAUSE.

The petitioner does not answer, (or even attempt to answer) the most nagging question presented by his contentions. If the defendant is free to attack the credibility judgment of the court issuing the search warrant, what end is served by securing a warrant in the first place? What is the purpose of the warrant procedure?

The simple truth is that if a search upon a legally sufficient warrant is subject to the same scope of attack on a motion to suppress as a search without a warrant, then the act of the police in securing the warrant and the act of the court in issuing it are both pointless.

The inability to assign a meaningful role to the judgment of an issuing judge or magistrate under a rule which makes no distinction between motions to suppress on warrant and non-warrant cases has caused an overwhelming majority of courts to reject the rule defendant advocates.

The petitioner argues that he can prove that the allegations in the complaint are untrue. Assuming this is the case, there is little justification for allowing such proof in a motion to suppress real evidence. The admission of illegally seized evidence does not affect the integrity of the process of guilt determination. There is, of course, a significant constitutional and practical difference between alleged errors which affect the reliability of the guilt determining process and those which do not.

Linkletter v. *Walker*, 381 U.S. 618, 629 (1965). *Desist* v. *United States*, 394 U.S. 244 249-30 (1969). *McCray* v. *Illinois*, 386 U.S. 300, 306-07. Any possible error of the magistrate in issuing a warrant does not affect the reliability or legitimacy of the evidence seized: Further, the submission of an affidavit to a neutral, detached magistrate, whose judgment as to legal sufficiency is subject to review, would serve the purposes envisioned by the promulgation of the exclusionary rule.

C.

A MAJORITY OF JURISDICTIONS DO NOT PERMIT A DEFENDANT TO GO BEYOND THE FOUR CORNERS OF THE WARRANT.

The leading State case on the issue is *Smith* v. *State*, 191 Md. 329, 335; 62 A. 2d 287, 289 (1948) *cert. denied*, 336 U.S. 925 where the court held:

> "The better rule seems to be that the Court's consideration of the showing of probable cause should be confined solely to the affidavit itself, and the truth of the alleged grounds stated in the affidavit cannot be controverted . . . by receiving the testimony of the accused and other witnesses."

The Court of Appeals of Maryland has adhered to this rule despite numerous attacks. See *Tucker* v. *State*, 244 Md. 488, 224 A. 2d 111 (1966) (reviewing recent cases of the United States Supreme Court) *cert.* denied, 386 U.S. 1024; and *State* v. *Scarborough*, 238 A. 2d 297 (Md. App. 1968).

The Oklahoma Court of Criminal Appeals has reached a similar result using similar language, *State* v. *Edwards*, 311 P. 2d 266, 269 (1957); *Gaddis* v. *State*, 447 P. 2d 42, 45 (Okla. Crim. 1968); *Phillips* v. *State*, 244 Pac. 451

(Okla. Crim. 1926). Texas has held that "It is well settled that a trial court may not go behind the affidavit for a search warrant to determine the falsity of the facts stated therein in order to invalidate a search warrant valid upon its face." *Griffey* v. *State*, 327 S.W. 2d 585, 587 (Tex. Crim. 1959); *Jackson* v. *State*, 365 S.W. 2d 935, 938 (Tex. Crim. 1963).

The Supreme Court of Arkansas has recently held similarly: "The general rule is that, in the absence of a statute, a subsequent showing of the falsity of an affidavit for search warrant cannot retrospectively invalidate a warrant valid when it was issued. *Liberto* v. *State*, 541 S.W. 2d 464, 468 (Ark. 1970).

In Annotation, 5 A.L.R. 2d 394, 396 it is stated that "a large majority of the cases deciding the question apart from governing statutory provisions take the position that one against who a search warrant is issued may not dispute the matters alleged in the affidavit or verified complaint supporting the warrant . . . [There] are a large number of decisions—which represent an overwhelming majority of those cases decided apart from applicable statutes—supporting the view that the matters contained in an affidavit or verified complaint on which a search warrant is based may not be questioned or disputed by the person against whom the warrant is directed." See *Bowen* v. *Commonwealth*, 251 S.W. 625 (Ky. 1923); *State* v. *Stevens*, 292 S.W. 36 (Mo. 1927).

The rationale of this rule is stated in *Owens* v. *State*, 399 S.W. 2d 507, 511 (Tenn. 1966):

> "It is clear, then, that the facts stated in the affidavit, i.e., the facts upon which the affiant bases his reasonable belief, are not subject to contradiction at trial for the purpose of suppressing the evidence secured by means of the warrant. This is so because

> the magistrate determines the verity of the facts, at least he is supposed to, before he issues the warrant."

See also *Gallimore* v. *State*, 116 S.W. 2d 1001 (Tenn. 1938).

The Circuit Court of Appeals for the District of Columbia has held that, "It is sufficient that the affidavit showed probable cause at the time the warrant was issued." *Kenney* v. *United States*, 157 F. 2d 442 (D.C. Cir. 1946). The rule was followed and other federal precedents were discussed by Judge Holtzhoff in *United States* v. *Gianaris*, 25 F.R.D. 194 (D.D.C. 1960); See also, *United States* v. *Brunett*, 53 F. 2d 219 (W.D. Mo. 1931); *United States* v. *Bowling*, 351 F. 2d 236, 242n.2 (6th Cir. 1965).

Petitioner seemingly suggests that the above decisions have been abrogated by *Mapp* v. *Ohio*, 367 U.S. 643 (Petitioner's Br. p. 6); however, no less than six (6) state decisions, aside from the instant case, have post-dated *Mapp* and support the Peoples view. Also in *Rugendof* v. *United States*, *supra*, a post *Mapp* decision, this Court stated that the issue here presented has not been decided. It was, however, implicitly decided against petitioner in *McCray*.

D.

A DEFENDANT SHOULD NOT BE PERMITTED TO CHALLENGE A PRIOR JUDICIAL DETERMINATION OF PROBABLE CAUSE WITHOUT PRESENTING SUBSTANTIAL JUSTIFICATION FOR SUCH A CHALLENGE—MORE THAN A MERE CREDIBILITY CONTEST BETWEEN DEFENDANT'S WITNESSES AND THE AFFIANT.

Even if a defendant is allowed to challenge the truthfulness of an affidavit the Courts should require that a

defendant present more than the prospect of a credibility contest between the affiant and the defendant's witnesses.

If a credibility contest is sufficient cause to allow the truthfulness of an affidavit to be challenged, then every affidavit will be challenged and the dire results the People fear will inevitably occur.

In the alternative, the People suggest that a defendant be precluded from challenging the truth of an affidavit for a warrant on the basis of oral testimony which merely contradicts the allegations of the warrant as was presented in the instant case.[1]

The affiant stated in his affidavit that he observed certain persons enter through a rear door of the tavern and walk behind a partition made of piled up beer cases in which area the bets were taken. The petitioner states that by pictures and testimony he could show that the affiant could not have observed what he alleged because of the physical layout of the tavern. It goes without saying that the interior of the tavern as described by the officer was readily subject to change. It further goes without saying that the defendant and others interested in the tavern

1. The instant petitioner could not show factually that the affiant in this case was not telling the issuing magistrate the truth as was pointed out in the opinion of the Supreme Court of Illinois, 45 Ill. 2d at 41-42, petitioner alleged that he could show that the information supplied by the informant to the officer in the past had not lead to a conviction, and that the interior of the tavern was not as described by the officer. But the affiant specifically stated that he based his reliance on the informant on past information which had lead to arrests and never told the judge that convictions had flowed from these (affidavit set out at page 31 of petitioner's brief).

would have strong reasons for wanting its condition changed. Photographs of the interior of the tavern would not prove that the physical layout of the tavern was other than stated by the affiant at the time he was present in the tavern, they would prove at most that the affiant's observations, due to the physical layout, are not possible at the present time.

The Court should require the production of concrete evidence showing beyond reasonable dispute that the allegations are materially false.[2]

Further, this Court should require that the defendant and the witnesses who support him be compelled to testify subject to cross-examination and to introduce all physical evidence prior to requiring a hearing on the truth of the affidavit's allegations.

This procedure will not prejudice defendant whose testimony on the motion is inadmissible at trial. *Simmons v. United States*, 390 U.S. 377 (1968). But the procedure will give a trial judge a concrete basis on which to determine whether the attack on the affidavit is well taken and substantial. It will also prevent a defendant from forcing the prosecution to dismiss a charge to protect an

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2. E.g. A defendant may be able to prove with witnesses of indisputable reliability and with plane tickets, hotel and restaurant receipts that on the day the informer says he bought narcotics from him the defendant was in Los Angeles. Or a defendant may prove that the building in which the informer said he purchased narcotics from defendant was torn down years before. In neither of these two situations would this proof be conclusive since the informer may have innocently erred as to date or address but such proof at least presents a reasonable basis for inquiring into the truth of the affidavit.

informer merely on the basis of unsworn pleadings and nebulous offers of proof. Finally, such a rule will limit the exercise of the trial court's power to disregard a prior judicial determination of probable cause and redetermine the issue to those cases in which it is absolutely necessary to do so.

CONCLUSION

The People of the State of Illinois ask this Court to deny the petition for certiorari because there is no constitutional requirement that a defendant be allowed to challenge a prior judicial determination that there is probable cause for a search, or, in the alternative, because petitioner has failed to produce more than a mere swearing contest between his witnesses and the affiant.

Respectfully submitted,

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